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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 165

NORMAN H. BUCK AND MIGUEL R. GUERRA,

*Appellants,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA.

## BRIEF FOR RESPONDENT.

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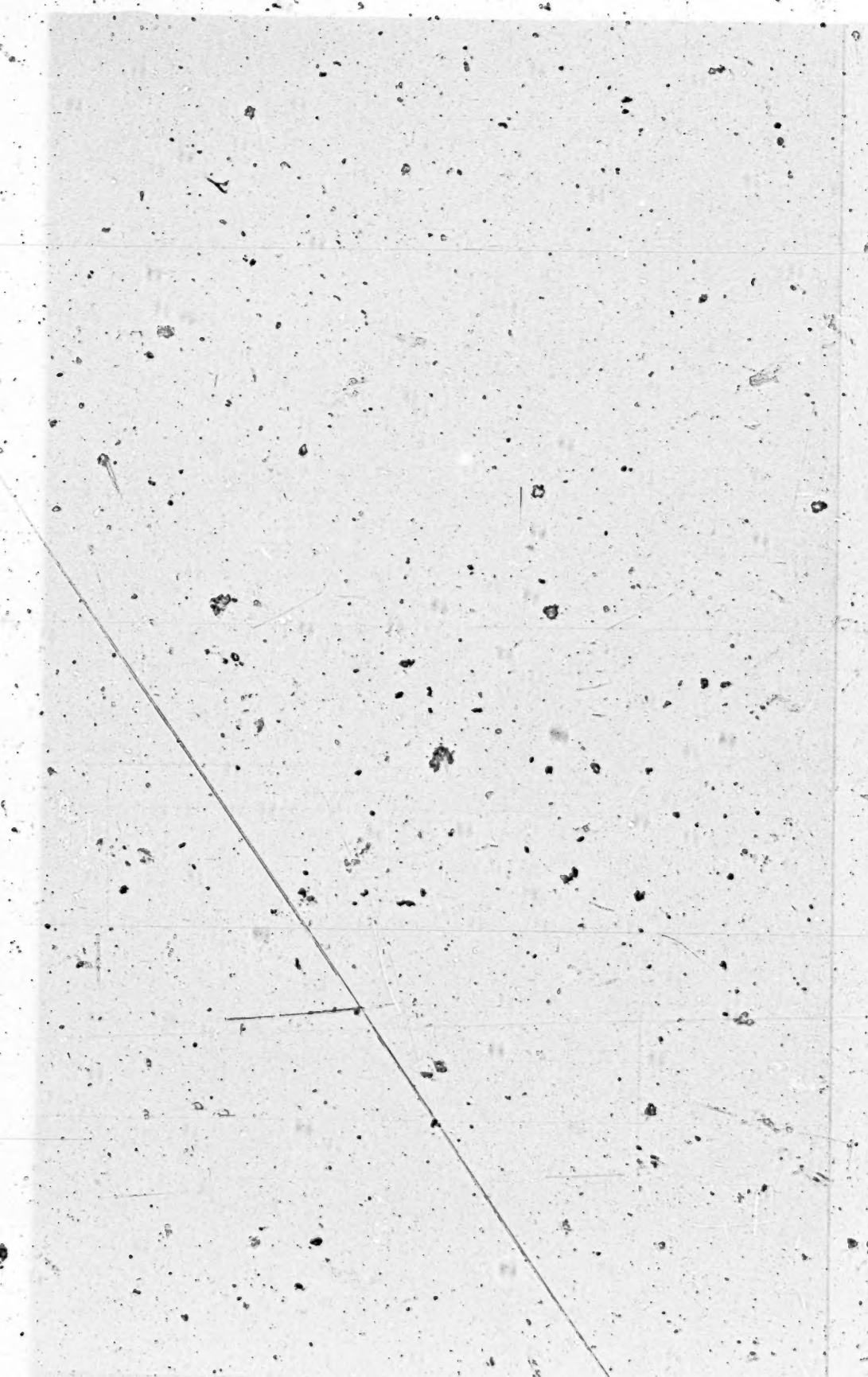

## SUBJECT INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 2 |
| STATUTES INVOLVED | 3 |
| STATEMENT | 3 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 7 |
| I THE POLICE POWER PERMITS TAXICAB REGULATION | 7 |
| II CONGRESS HAS SPECIFICALLY EXEMPTED TAXICABS FROM FEDERAL REGULATION | 10 |
| III THE STATE OF CALIFORNIA PERMITS LOCAL REGULATION | 11 |
| IV THE LICENSE FEES ARE REASONABLE | 11 |
| V THE ORDINANCE HAS NOT BEEN ENFORCED IN AN UNREASONABLE OR DISCRIMINATORY FASHION | 14 |
| a. The economic impact is not burdensome or unreasonable | 14 |
| b. The possession of other licenses by appellants is immaterial | 15 |
| VI APPELLANTS HAVE NOT EXHAUSTED THEIR LOCAL ADMINISTRATIVE AND JUDICIAL REMEDIES | 24 |
| CONCLUSION | 28 |

# TABLE OF AUTHORITIES CITED

## Cases

PAGE

Aero Mayflower Transit Co. v. Georgia Public Service Comm., 295 U. S. 285 79 L. Ed. 1439, 55 S. Ct. 709 ..... 12, 13

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495, (92 L. Ed. 99, 68 S. Ct. 167) ..... 12, 28

American Motor Coach System v. Philadelphia, 28 F. 2d 736 ..... 12

Bay City Plumbing and Heating Company v. Lind, 235 Mich. 455, 209 N.W. 579 ..... 21

Beene v. Bryant (Tex. Civ. App.) 201 S.W. 2d 268 ..... 18

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 92 L. Ed. 455, 68 S. Ct. 358 ..... 19

Bradley v. Richmond, 227 U. S. 477, at 485, 57 L. Ed. 603, 33 S. Ct. 318 ..... 18, 25

Buck v. Kuykendall, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324 ..... 18

California v. Thompson, 313 U. S. 109, 85 L. Ed. 1219, 61 S. Ct. 930 ..... 10

California v. Zook, 336 U. S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 ..... 10

City of Bridgeton v. Zeller, 100 N. J. L. 33, 124 A. 520, 101 N. J. L. 206, 127 A. 924 ..... 20

Clark v. Gray, 306 U. S. 583, 599 83 L. Ed. 1001, 59 S. Ct. 744 ..... 12, 13

Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702 ..... 28

Clem v. City of La Grange, 169 Ga. 51, 149 S. E. 638, 65 A. L. R. 1361 ..... 8

Cleveland R. Co. v. North Olmsted, 130 Ohio St. 144, 198 N. E. 41, 101 A. L. R. 426 ..... 21

Commonwealth v. Kelly, 229 Ky. 722, 17 S. W. 2d 1017 ..... 21

Commonwealth v. McCarthy, 225 Mass. 192, 114 N. E. 287 ..... 18

Cooley v. Board of Port Wardens, 53 U. S. 299, 12 How. 299, 13 L. Ed. 996 ..... 10

Cooper v. Greenwood, 195 Ark. 26, 111 S. W. 2d 452 ..... 20

Di Santo v. Pennsylvania, 273 U. S. 34, 71 L. Ed. 524, 47 S. Ct. 267 ..... 10

District of Columbia v. Monumental Motor Tours, 122 Fed. 2d 195 ..... 21

PAGE

Eicholz vs. Public Service Commission, 306 U. S. 268, 83 L. Ed. 641, 59 S. Ct. 532 ..... 23

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 ..... 19

Fleming v. Wright, 225 Ky. 129, 7 S. W. 2d 832 ..... 21

Frost v. Railroad Commission (1926) 271 U. S. 583, at 601, 70 L. Ed. 1101, 46 S. Ct. 605 ..... 8

Gr. Nor. R. Co. v. Washington, 300 U. S. 154, 81 L. Ed. 573, 57 S. Ct. 397 ..... 13

Greif v. Dullea, 66 Cal. App. (2d) 986, 153 P. 2d 581 ..... 23, 25

Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 S. Ct. 633 ..... 18, 27, 28

Hendrick v. Maryland, 235 U. S. 610, 624, 59 L. Ed. 385, 35 S. Ct. 140 ..... 13, 28

Ingels v. Morf, 300 U. S. 290, 296, 81 L. Ed. 653, 57 S. Ct. 439 ..... 13

Interstate Busses Corp v. Blodget, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230 ..... 13

Isch, ex parte, 174 Cal. 180, 162 Pac. 1026 ..... 16

Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222, 37 S. Ct. 30 ..... 28

John P. King Co. v. City of Augusta, 277 U. S. 100, 12 L. Ed. 801, 48 S. Ct. 489 ..... 16

Lehon v. Atlanta, 242 U. S. 53, 55, 61 L. Ed. 145, 13 S. Ct. 481 ..... 18, 26

Martinez, In re, 22 Cal. 2d 259, 138 P. 2d 10 ..... 8, 11, 22

McDonald vs. Thompson, 305 U. S. 263, 83 L. Ed. 164, 59 S. Ct. 176 ..... 22

Morf v. Bingaman, 298 U. S. 407, 410, 80 L. Ed. 1245, 56 S. Ct. 756 ..... 12

Nippert v. Richmond, 327 U. S. 416, 90 L. Ed. 760, 66 S. Ct. 586 ..... 14

Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579 ..... 17

Opdyke v. Annistron, 16 Ala. App. 436, 78 So. 634 ..... 20

Ostroff v. Valentine, 257 App. Div. 314, 12 N. Y. Supp. 2d 968 ..... 18

Packard v. Banton, 264 U. S. 140-144-145, 68 L. Ed. 596, 44 Sup. Ct. Rep. 257 ..... 8, 9

People v. Buck, 101 Cal. App. (2d) (Supp.) 907, 226 Pac. (2d) 87 ..... 1

People v. Stolzoff, 71 Cal. App. (2d) Supp. 849, 162 P. 2d 743 ..... 22

PAGE

Phyle v. Duffy, 334 U. S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131 ..... 28

Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 90 L. Ed. 1342, 66 S. Ct. 1142 ..... 11

Robertson v. California, 328 U. S. 440, 90 L. Ed. 1366, 66 S. Ct. 1160 ..... 10

Scott v. Hart, 128 Miss. 353, 91 So. 17 ..... 18

Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508 ..... 28

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510 ..... 28

Southern Railroad Company v. King, 217 U. S. 524, 54 L. Ed. 524 ..... 14

Stanislaus County Dairymen's Protective Assn. v. Stanislaus County, 8 C. 2d 378, 65 P. 2d 1305 ..... 16

Star Transp. Co. v. Mason City, 195 Iowa 930, 192 N. W. 873 at 881 ..... 20

State v. Gamelin, 111 Vt. 245, 13 A. 2d 204 ..... 8, 20, 21

Strickler v. Schaaf, 199 Wash. 372, 91 P. 2d 1007, 123 A. L. R. 226 ..... 20

Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 ..... 19

Terminal Railroad Association v. Brotherhood of Railroad Trainmen, 318 U. S. 1, 87 L. Ed. 571, 63 S. Ct. 420 ..... 14

U. S. v. Slobodkin, 48 F. Supp. 913 ..... 18

U. S. v. Yellow Cab Co., 69 F. Supp. 170 ..... 29

Village of E. Alton v. Arst, 386 Ill. 224, 53 N. E. 2d 929 ..... 18

H. P. Welch v. New Hampshire, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438 ..... 28

Willson v. Black Bird Creek Marsh Co., 27 U. S. 245, 2 Pet. 245, 7 L. Ed. 412 ..... 10

Yellow Taxicab Co. v. Gaynor, 82 Misc. 94, 143 N. Y. Supp. 279 at 301 ..... 8, 18

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 ..... 17

## TEXTBOOKS

37 Am. Jur., 562, sec. 72 ..... 29

60 C. J. S., 254, sec. 79, 80 ..... 29

28 Calif. Law Rev. 168 ..... 14

PAGE

McQuillin on Municipal Corporations,
Second Edition, Volume 3, page 31 ..... 20

Third Edition, Volume 9, Page 421, sec. 26.173, Page 423.... 21, 29

## STATUTES

California Constitution Art. III sec. 23..... 3, 11

California Public Utilities Act (Cal. Stats. 1915 p. 115 as amended), Deering's California General Laws, Act 6386.... 3, 11, 22

California Motor Vehicle Transportation License Tax Law, Sections 9601 through 10501 of the Revenue and Taxation Code..... 16

California Vehicle Code Sections 250 (b), 272 and 274..... 15

Motor Carrier Act 1935, Interstate Commerce Act part II, 49 U. S. C. A. secs. 301-327, especially 303 (b)..... 3

San Diego County Ordinance No. 464 (NS), as amended by Ordinances Nos. 609 (NS), 958 (NS) and 964 (NS) ..... 3, 4, 11, 20, 22, 24

U. S. Code Annotated, Title 49, Section 303 (b) (2)..... 10, 16

U. S. Code Annotated, Title 28, Sec. 1257 (2), C. 646, 62 Stats. 929, 28..... 2

U. S. Constitution Art. I, Sec. 8, Clause 3 (Commerce clause)..... 3

IN THE

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No. 165

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*Appellants,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA.

## BRIEF FOR RESPONDENT

### Opinions Below.

The facts in the trial court were stipulated (R. 10-15, with attached exhibits R. 15-26). The opinion of the Superior Court (R. 31-36) is reported in 101 California Appellate Reports (2d) (Supp.) 907, 226 Pac. (2d) 87. The opinion of the Justice of the Peace who tried the case (R. 52-54) is not reported.

### Jurisdiction.

The judgment of the Superior Court was filed December 14, 1950 (R. 31). An order denying a petition for rehearing was filed January 5, 1951 (R. 45). An order allowing appeal was made April 4, 1951 (R. 55) by the presiding judge of the appel-

late department of the Superior Court. An order noting probable jurisdiction (R. 59) was made October 8, 1951.

The jurisdiction of this court rests upon the provisions of C. 646, 62 Stats. 929, 28 U.S.C.A. sec. 1257 (2).

## Questions Presented.

1. May a county require of the owner or driver of a taxicab licenses to engage in such occupations as applied to traffic originating in a foreign country?

2. May such a licensing ordinance be enforced as to traffic passing through unincorporated territory in cases where the destination of the passengers is an incorporated city?

3. Is it an unreasonable burden upon foreign commerce to require in a taxicab licensing ordinance:

(a) A fee of $50.00 per annum from persons engaging in the business plus an additional $1.00 for each vehicle and each driver so engaged.

(b) A qualifying license of each driver and each proprietor requiring, among other things, good moral character and a knowledge of the geography of the county.

(c) Where the ordinance provisions are severable, is the $1.00 licensing provision unreasonably burdensome as to the driver of the cab?

4. May one subject to a licensing ordinance complain of alleged unjust revocation or denial of a license as a defense to a prosecution for operating without a license where he does not invoke or exhaust administrative and judicial review available to him to review such revocation or denial?

5. In a criminal prosecution for operating without a license, if the licensing ordinance is fair and reasonable on its face, must not alleged discrimination in its enforcement be shown affirmatively in the trial court if it is to be considered as a defense to such prosecution?

## Statutes Involved.

San Diego County Ordinance No. 464 (New Series) as amended by Ordinances Nos. 609 (New Series), 958 (New Series) and 964 (New Series) is set forth at R. 46-52.

United States Constitution Article I Section 8, Clause 3 (Commerce clause).

Motor Carrier Act 1935, Interstate Commerce Act part II, 49 U.S.C.A. secs. 301-327, especially sec. 303 (b).

California Public Utilities Act (Cal. Stats. 1915 p. 115 as amended, Deering's California General Laws, Act 6386).

California Constitution Art. III sec. 23.

## Statement.

At the date this brief goes to the printers, November 15, 1951, respondents have not received appellant's brief, which was due November 8. Consequently this statement and the brief as a whole is not responsive to appellant's brief, and in writing this we can only assume that appellant's arguments are substantially the same as those they advanced in the lower courts.

The complaints in issue (R. 24-26) charge appellants with violation of section 9 of San Diego County Ordinance No. 464 (New Series) as amended. The complete ordinance is found at R. 46.

Section 9 reads as follows:

"It shall be unlawful for any person to drive or to be in actual physical control of any taxicab in the unincorporated area of the County of San Diego without first obtaining a permit in writing so to do from the sheriff of the County of San Diego.

"Applicants for such permits shall file applications therefor with the sheriff of the County of San Diego on a form furnished by the sheriff which, when completed, will contain full personal information concerning the applicant.

"Upon obtaining a permit as herein required the holder of such permit shall be entitled to an identification card of such design, and bearing such number as the sheriff may prescribe, upon payment of a fee of $1.00 annually, therefor, which shall be paid by the applicant to the tax collector and shall be due on the 1st day of June of each year. Such card shall be carried by the permittee during all business hours and shall not be transferable.

"Each applicant for a permit shall be examined by the sheriff as to his knowledge of the provisions of this ordinance, the Vehicle Code, traffic regulations and the geography of the county, and if the result of the examination is unsatisfactory he shall be refused a permit. The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude.

"The sheriff may in his discretion direct the tax collector to issue a temporary permit pending final action on such

application for permit. If a permit is denied or revoked, the permit shall be forthwith surrendered to the sheriff. No portion of the fee for a temporary or permanent taxicab driver's permit shall be returnable upon denial or revocation of such permit.

"Any person whose taxicab driver's permit shall have been revoked or renewal is refused by the sheriff, may within ten (10) days after receipt of notice thereof, appeal to the Board of Supervisors for a hearing thereon and the decision of the Board of Supervisors in this regard shall be final: If no appeal is taken within ten days, the action of the sheriff shall be final.

"To facilitate the hearing and disposition of such appeal, the Board of Supervisors may appoint a referee to take testimony and to report his findings and recommendations to the Board. If the Board appoints a county officer or county employee to act as referee, he shall serve as such referee without any additional compensation. All time spent as a referee shall be considered as time spent by such officer or employee in performing the duties of his position."

Section 13 (R. 51) permits any violation to be punished as a misdemeanor.

The case was submitted to the Justice's Court upon an agreed statement of facts (R. 10-15). It was stipulated (R. 13) that on the occasion of the arrest the appellants were carrying passengers from a point on the Mexican side of the international boundary to places "other than the unincorporated area of the County of San Diego within the State of California".

The trip was not an isolated one but represents an established and regular course of business (R. 10, 18).

The arrest was made within the unincorporated territory (R. 13).

The stipulated facts (R. 11-12) refer to an injunction action brought by present appellants against the Sheriff in the United States District Court. The findings and judgment of that court are attached as exhibits to the stipulation (R. 17-24) and it is further stipulated (R. 12) that the findings may be considered as accurate statements of fact.

The United States District Court by its judgment denied an injunction and dissolved the injunction pendente lite (R. 24). Two provisions of the ordinance as it then existed were declared or deemed void, but these provisions were deleted or amended by later amendment (R. 12). The District Judge found (R. 22, 24) that in all other respects the ordinance is valid. In the District Court findings (R. 20,21) are set forth the accusations under which the licenses of Buck and Guerra were revoked.

The Justice's Court found the ordinance valid and pronounced judgment accordingly (R. 2, 4, 6) that each defendant pay a fine of $250.00 of which $200.00 was suspended for two years on condition the ordinance be not further violated.

## SUMMARY OF ARGUMENT

The People of the State of California urge in support of the validity of the ordinance as applied the following points:

1. Regulation of taxicabs is universally accepted as a reasonable and proper exercise of the police power.

2. Congress has specifically exempted taxicabs from regulation by the Interstate Commerce Commission and has thereby elected to permit state or local regulation of taxicabs engaged in interstate or foreign commerce.

3. The State of California has likewise delegated to local governmental agencies the regulation and control of taxicabs.

4. The appellants have not shown, nor do the record or other facts disclose, that the amount of the license charged is unreasonable or in excess of the sum required for administration of the ordinance.

5. The appellants have not shown that the ordinance is either in its wording or in its application or enforcement, unreasonable or discriminatory.

a. The ordinance does not discriminate against appellants or operate as an undue economic burden upon them. The record discloses no cumulative burden of taxation by numerous local agencies or municipalities.

b. The possession of other permits and licenses by appellants did not exempt them from the requirements of the ordinance in question.

6. The appellants have not invoked or exhausted the available administrative and judicial remedies relating to the revocation and denial of their licenses.

## ARGUMENT

### I.

### THE POLICE POWER PERMITS TAXICAB REGULATION

In support of the proposition that the police power conferred upon local government permits the regulation, control and licensing of taxicabs, only a few of the numerous cases so holding need be cited.

In *re Martinez*, 22 Cal. 2d 259, 138 P. 2d 10;

*Clem v. City of La Grange*, 169 Ga. 51, 149 S.E. 638, 65 A.L.R. 1361;

*State v. Gamelin*, 111 Vt. 245, 13 A. 2d 204.

*Packard v. Banton*, 264 U. S. 140 at 144.

The reason for sustaining the police power as to taxicabs is readily apparent. Taxicab drivers have a unique opportunity to defraud customers. Cases of murder and rape committed by taxicab drivers upon passengers are unfortunately not unknown. In the instant case counsel will not dispute that many, if not most of the passengers picked up at the border seeking transportation to San Diego and other incorporated cities are members of the armed services of the United States, many of them young, inexperienced and ignorant. Some of them at the time of engaging a taxicab will have been drinking. It is of prime importance for the protection of these young men that the power of the Sheriff to revoke or deny licenses to persons of demonstrably bad moral character be recognized.

In *Frost v. Railroad Commission*, 271 U. S. 583, at 601, Mr. Justice Holmes, said, dissenting:

> "The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a state speaking through its legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as I presume, most states or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its

going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as is to determine the number, character and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. I see nothing in this act that would (602) require private carriers to become common carriers, but if there were such a requirement, it, like the provisions concerning rates and accounts, would not be before us now, since, as I have said, the statute makes every section independent and declares that if valid it shall stand even if all the others fall. As to what is before us, I see no great difference between requiring a certificate and requiring a bond as in *Packard v. Banton*, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. Rep. 257, and although, as I have said, I do not get much help from general propositions in a case of this sort, I cannot forbear quoting what seems to me applicable here. Distinguishing between activities that may be engaged in as a matter of right and those like the use of the streets that are carried on by government permission, it is said: 'In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissable in the former.' 264 U. S. 145. I think that the judgment should be affirmed."

In *Yellow Taxicab Co., v. Gaynor*, 82 Misc. 94, 143 N.Y. Supp. 279 at 301 in sustaining licensing requirements involving among other things, evidence of good moral character, the court emphasized recorded evidence of robberies and assaults committed by hackmen, and supports the manifestly justifiable public policy of requiring that taxicab drivers be licensed.

## II.

## CONGRESS HAS SPECIFICALLY EXEMPTED TAXICABS FROM FEDERAL REGULATION.

U. S. Code Annotated, Title 49 section 303b reads in part:

"Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include:

> (2) Taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini."

It has not so far been contended by appellants that they possess or need to possess a certificate from the Interstate Commerce Commission.

In the absence of Federal legislation dealing with the same subject, the reserve power of the state to exercise its police power, even as applied to one engaged in interstate or foreign commerce, is upheld.

*California v. Thompson*, 313 U. S. 109
*Di Santo v. Pennsylvania*, 273 U. S. 34 (dissenting opinions)
*Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L.Ed. 412
*Cooley v. Board of Port Wardens*, 12 How. 299, 13 L. Ed. 996
*Robertson v. California*, 328 U. S. 440.

Although the Superior Court in its opinion (R. 35) discusses *California v. Zook*, 336 U. S. 725, the present case is stronger on the point since that case turned on the problem whether state legislation which duplicates an act of Congress is in conflict with it, while in the present case Congress has stated clearly that

Federal control of taxicab operations is not intended. If the State and its subdivisions are powerless to exercise control the business will go unregulated and uncontrolled.

Specific authority conferred by Congress upon the States to regulate a given activity in interstate or foreign commerce will be upheld. *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408.

## III.

## THE STATE OF CALIFORNIA PERMITS LOCAL REGULATION.

Although the point is clear and may be of little interest to this court, the California Supreme Court, in *In re Martinez*, 22 Cal. 2d 259, 138 P. 2d 10 has held that the power to regulate and control taxicabs in California lies with local governmental agencies and not with the State Public Utilities Commission.

Such is the construction placed by the highest California court upon the provisions of Article III sec. 23 of the California Constitution and upon the Public Utilities Act (Cal. Stats. 1915 p. 115 as amended, Deering's California General Laws, Act 6386).

## IV

## THE LICENSE FEES ARE REASONABLE.

The ordinance imposes upon every person engaging in the taxicab business an annual fee of $50.00 plus an additional $1.00 for each cab and each driver. The $50.00 fee and the cab fee of $1.00 are imposed by Section 4 of the ordinance (R. 47), while the prosecution is under Section 9 (R. 49) which forbids driving of a taxicab without the $1.00 permit which Section 9 requires of the driver. Section 14 (R. 51) makes each provision severable. The opinion of the Superior Court limited its consideration to the provisions of Section 9 (R. 32).

Therefore, if the $50.00 fee provision in Section 4 should be considered burdensome, the present conviction can be sustained independently.

However, there was no evidence introduced in the Justice's court or elsewhere showing that the fee is excessive relative to the expense of administering the ordinance. In the absence of such evidence the reasonableness of the charge is presumed.

*Clark v. Gray*, 306 U. S. 583.

A flat fee, not unreasonable in amount has been sustained in *Morf v. Bingaman*, 298 U. S. 407.

*Aero Mayflower Transit Co. v. Bd. of R.R. Commissioners*, 332 U. S. 495.

*Aero Mayflower Transit Co. v. Georgia Public Service Comm.*, 295 U. S. 285.

In *Am. Motor Coach System v. Philadelphia*, 28 F. 2d 736, an annual license fee of $50.00 per bus was held not an unreasonable burden on interstate commerce.

In *Aero Mayflower Transit Co. v. Georgia Public Service Comm.*, 295 U. S. 285, 79 L. Ed. 1439, the following language appears:

> "The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. Our fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

In general it is submitted that appellants are precluded on the question of reasonableness of the $50.00 annual license fee by the federal court findings. Evidence was presented to the federal court

establishing that the expense of administering the ordinance was not met by the fees collected, which is accepted as a test of reasonableness in *Clark v. Gray*, 306 U. S. 583, 83 L. Ed. 1001. The same case holds that the burden of proving a license fee unreasonable so as to constitute a burden on interstate commerce is on the licensee and not on the state or municipality. In the absence of evidence by appellants establishing that the license fee is unreasonable, its reasonableness is presumed. On this point the Clark case cites at 306 U. S. 599:

*Hendrick v. Maryland*, 235 U. S. 610;
*Interstate Busses Corp. v. Blodgett*, 276 U. S. 245;
*Morf v. Bingaman*, 298 U. S. 410;
*Ingels v. Morf*, 300 U. S. 296;
*Gr. Nor. R. Co. v. Washington*, 300 U. S. 154.

As to the imagined case of a taxi driver who has to pay a large tax to drive through many localities, let us remember that the taxi business is essentially local; that bus transportation over fixed routes between fixed termini is governed by federal and state regulation and is beyond the jurisdiction of local regulatory bodies, and also the issue again is one that was passed upon and considered by the federal court. The quoted language from *Aero Mayflower Transit Co. v. Georgia Public Service Comm.* is the answer, that when the expense of regulation can only be met by a substantial fee, the fee is not made unreasonable by the fact that its broad privilege is little used.

The assumed facts also have no relationship to the case at bar. Here the activity of the appellants is substantial and involves regular and continued use of the county's highways and not occasional or sporadic use. The stipulated facts show that appellants are regularly engaged in the business of transporting passengers

for hire in and through the unincorporated area of San Diego County.

Justice Traynor of the California Supreme Court summarized the modern tendency at 28 Calif. Law Rev. 168:

> "Interstate commerce is no longer an indivisible whole, inviolate from taxation at any point, but an aggregate of component parts which may be separately taxable in various states. Henceforth states may fish in the stream of interstate commerce so long as they do not catch more than their legal limit."

## V.

## THE ORDINANCE HAS NOT BEEN ENFORCED IN AN UNREASONABLE OR DISCRIMINATORY FASHION.

a. The economic impact is not burdensome or unreasonable.

The argument of discriminatory application of an ordinance fair on its face finds no factual support in the record. The stipulated facts show only that the appellants were formerly licensed and that their licenses were revoked in compliance with the provisions of the ordinance (R. 20, 21). It also appears that, having revoked the licenses, the Sheriff continued to deny a renewal or re-issuance of licenses during the pendency of the criminal prosecution (R. 12, 13). It is generally accepted that one who complains of discriminatory enforcement of an ordinance fair on its face must establish by competent evidence that such discrimination exists (*Southern Railroad Company v. King*, 217 U. S. 524; *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1).

In this connection appellants rely on *Nippert v. Richmond*, 327 U. S. 416, particularly on the footnote No. 21 at Page 430, referring to the case of an itinerant trucker who, going through

all the counties of Arizona, had to pay $4,400 in fees. The distinction is principally one of actual economic impact. Appellants here do not intend to drive through a series of counties. Instead, as shown by the stipulated facts and the finding of the U. S. District Court (R. 10, R. 18) their sole point of picking up passengers was directly adjacent to the International Border on the Mexican side of the line. The stipulation in Paragraph 2 at Page 10 of the record and the findings at Page 18 of the record indicate that the greater proportion of the passengers are taken to the City of San Diego. The U. S. District Court findings establish that at the time of that trial passengers were taken to unincorporated as well as to incorporated areas. The stipulation shows that counsel for appellants at least advised them thereafter not to accept passengers for the unincorporated area. In any event, there is nothing whatever to establish that the business was not confined to a relatively limited area extending some 18 miles between the International Border and the City of San Diego. The distance traveled on the Mexican side amounted to 75 feet or less. The distance traveled through the unincorporated area of San Diego County amounts to some 15 to 18 miles, depending on whether or not the route selected passes through the incorporated cities of National City and Chula Vista.

b. The possession of other licenses by appellants is immaterial.

An attempt is made to build up the claim of discrimination by reference to the other licenses and permits possessed by or required of the appellants. They have and are required to have the following: First, a Chauffeur's License issued by the Department of Motor Vehicles of the State of California as required by Vehicle Code Sections 250 (b), 272 and 274, which provisions are applicable to anyone operating a motor vehicle in the employ of another. Second, a Motor Vehicle Transportation License re-

quired by Sections 9601, 9651, 9701 of the Revenue and Taxation Code. The Motor Vehicle Transportation License Tax Law, Sections 9601 through 10501 of the Revenue and Taxation Code, is clearly a revenue measure, does not involve police regulation or control, and is in addition to all other forms of regulation and control. Section 9704 expressly provides: "No license issued authorizes the operation of any motor vehicle upon the public highways of this State contrary to the laws in effect regulating the operation of motor vehicles."

It is well settled that in California a valid county or municipal ordinance is a law or a statute. *Stanislaus County Dairymen's Protective Assn. v. Stanislaus County* 8 C. 2d 378, 65 P. 2d 1305, *Ex parte Isch,* 174 Cal. 180, 162 P. 1026, and see *John P. King Co. v. City of Augusta* 277 U. S. 100.

As to the possession by the appellants of licenses to operate in the City of San Diego, the City ordinance is not in the record. After conference with the City Attorney we are prepared to state that the possession of a City License is not required by the existing City ordinance of taxicabs that come into the City and discharge their passengers. The City, on the other hand, licenses two types of vehicles, neither of which has so far been operated by the appellants. It licenses as taxicabs only cabs equipped with a taxi meter. The City also limits the number of taxicabs. It licenses as cars for hire only seven-passenger limousines, which vehicles, if they operated in foreign commerce, would have to secure a certificate from the Interstate Commerce Commission inasmuch as a seven-passenger vehicle is not within the exemption set forth at Title 49, U.S.C.A. Section 303 (b) (2).

From the Federal court finding (R. 18, 19) it appears that both Buck and Guerra had San Diego City taxicab driver's licenses entitling them to work for a licensed proprietor. Buck

has a car-for-hire license allowing him to own and operate a seven-passenger limousine. Neither is entitled to own or operate a taxi business in the City.

There is a highly significant omission among the various licenses and permits which appellants might be supposed to possess. They allege a lawful and respectable business originating in Mexico. It does not appear that they possess any license, permit, certificate or authority from the Mexican Government or any agency thereof. This is a factor going to moral character and fitness to operate. If it be true, as contended by the Sheriff of San Diego County throughout these proceedings, that these operations on the Mexican side are illegal and are permitted only by bribery of Mexican officials, we have a factor bearing directly upon the moral character of appellants and one which can best be determined in a proceeding in which the moral character of appellants is in issue. A proceeding in mandamus or certiorari to compel issuance of a license would raise such an issue.

On the point of discriminatory enforcement in general it may be noted that the appellants have not invoked either the equal protection or the due process clauses of the 14th Amendment. Cases arising under those clauses wherein it is argued that a state law or local ordinance has been administered "with an evil eye and unequal hand" involve in each case a factual showing of such maladministration and not mere surmise; for example, *Norris v. Alabama*, 294 U. S. 587; *Yick Wo v. Hopkins*, 118 U. S. 356.

An examination of authorities dealing with taxicab licensing discloses that the ordinance here involved appears to be a normal and conventional type of ordinance.

With specific application to taxicab operations, it has been held that moral character is a reasonable requirement of a licensing ordinance.

*Scott v. Hart,* 128 Miss. 353, 91 So. 17;

*Beene v. Bryant* (Tex. Civ. App.) 201 S. W. 2d 268;

*Ostroff v. Valentine,* 257 App. Div. 314, 12 N. Y. Supp. 2d 968;

*Yellow Taxicab Co. v. Gaynor,* 82 Misc. 94, 143 N. Y. Supp. 279.

In proceedings to prosecute criminally the offense of violation of a licensing ordinance, it is held to be no defense that a license was applied for and refused.

*Commonwealth v. McCarthy,* 225 Mass. 192, 114 N.E. 287;

*U. S. v. Slobodkin,* 48 F. Supp. 913;

*Village of E. Alton v. Arst,* 386 Ill. 224, 53 N.E. 2d 929;

*Lehon v. Atlanta,* 242 U. S. 53;

*Bradley v. Richmond,* 227 U. S. 477;

*Gundling v. Chicago,* 177 U. S. 183.

On the general topic of discrimination it is urged that there are certain things the ordinance does not do or require which may be considered in evaluating its entire impact:

1. There is no limitation on the number of licenses.

2. There is no regulation of rates.

3. There is no requirement of fixed stands or regular places of business.

4. There is no limitation as to route or area served by each or any license.

*Buck v. Kuykendall,* 267 U. S. 307, may be distinguished in that in the present ordinance there is no limitation on the number of licenses and, consequently, the only effect relating to competition is the narrow one of refusing licenses on the basis of bad moral character or criminal conviction.

In relation to the question whether the ordinance is invalid where applied to vehicles which only pass through incorporated territory without stopping, the authorities in point are apparently not numerous or particularly convincing. In the present case it is submitted that as a Federal question it is immaterial except as it relates to the question of an unreasonable burden. As stated in the Superior Court opinion by Judge Burch (R. 36):

> "The record does not disclose that defendants are required by any other political division than San Diego County to evidence their fitness to operate taxicabs on the State's highways.
>
> "A peculiar situation of San Diego County in relation to taxicab passenger traffic across the border from Mexico would seem to put the County in a position to exercise such control over this traffic as might ordinarily be exercised by the State Legislature since taxicab control is delegated by the State to the County. (See *Bob-Lo Excursion Co. v. Michigan* [333 U. S. 28])".

It is accordingly urged that if it be conceded to the State of California that State control of the taxicab business is necessary and desirable and so recognized by Congress, the manner in which the State exercises that control directly or delegates it to local government or distributes it between local agencies is not a Federal question so long as its effect upon interstate or foreign commerce is not that of an unreasonable burden.

A contrary holding by this court would, it is submitted, mark a retrogression from the holding of *Erie R. Co. v. Tompkins*, 304 U. S. 64, to that of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865.

The cases also apparently sustain the right of several municipalities or governmental agencies to license taxicabs entering or using their streets.

*Star Transp. Co. v. Mason City*, 195 Iowa 930, 192 N. W. 873 at 881;

*State v. Gamelin*, 111 Vt. 245, 13 A. 2d 204;

*Opdyke v. Anniston*, 16 Ala. App. 436, 78 So. 634;

*City of Bridgeton v. Zeller*, 100 N.J.L. 33, 124 A. 520, 101 N.J.L. 206, 127 A. 924;

*Cooper v. Greenwood*, 195 Ark. 26, 111 S.W. 2d 452.

These cases discuss in part the question of residence or non-residence. This problem may not be material but it is observed that one of the appellants, Buck, is a resident of the unincorporated territory of the County of San Diego, while Guerra is a resident of Tijuana, Baja California, Mexico. This does not appear from the printed record but may be shown by examining the complaints printed at Pages 15 and 16 of the record, folio 28 and 30 from which the printed record was prepared.

On the point whether a taxicab driving through a municipality without stopping to pick up or discharge passengers is subject to licensing laws it must first be observed that isolated or rare trips do not constitute doing business and would not be subject to prosecution in any case. *Strickler v. Schaaf*, 199 Wash. 372, 91 P. 2d 1007, 123 A.L.R. 226. The ordinance itself in section 2 (R. 47) refers to "engaged in the business of running, driving or operating one or more taxicabs and carrying passengers in such taxicab or taxicabs for hire within the unincorporated area of the County of San Diego". Casual isolated operations are therefore not in violation of the ordinance.

In an earlier edition McQuillin on Municipal Corporations, Second Edition, Volume 3, page 31, the text stated "A license may be imposed on motor vehicles carrying passengers for hire which pass through the corporate limits as well as upon those which operate within the city". Candor compells the observation that

the cases there cited do not fully support the text statement although they do not hold the contrary. In the subsequent edition, Third Edition, Volume 9, page 423, the text states "Nonresidents operating taxicabs within a municipality have been held subject to licensing regulating and fees, even though they are operating their cabs in interurban as well as intracity business," citing *Commonwealth v. Kelly,* 229 Ky. 722, 17 S.W. 2d 1017, *Fleming v. Wright,* 225 Ky. 129, 7 S.W. 2d 832, *State v. Gamelin,* 111 Vt. 245, 13 Atlantic 2d 204.

A further case on this point is *District of Columbia v. Monumental Motor Tours,* 122 Federal 2d 195, holding that it is not an interference with interstate commerce for local government to impose a nondiscriminatory tax and a regulation upon transitory out-of-state vehicles.

Two cases sustaining the power of local government to regulate activities originating in another political subdivision are:

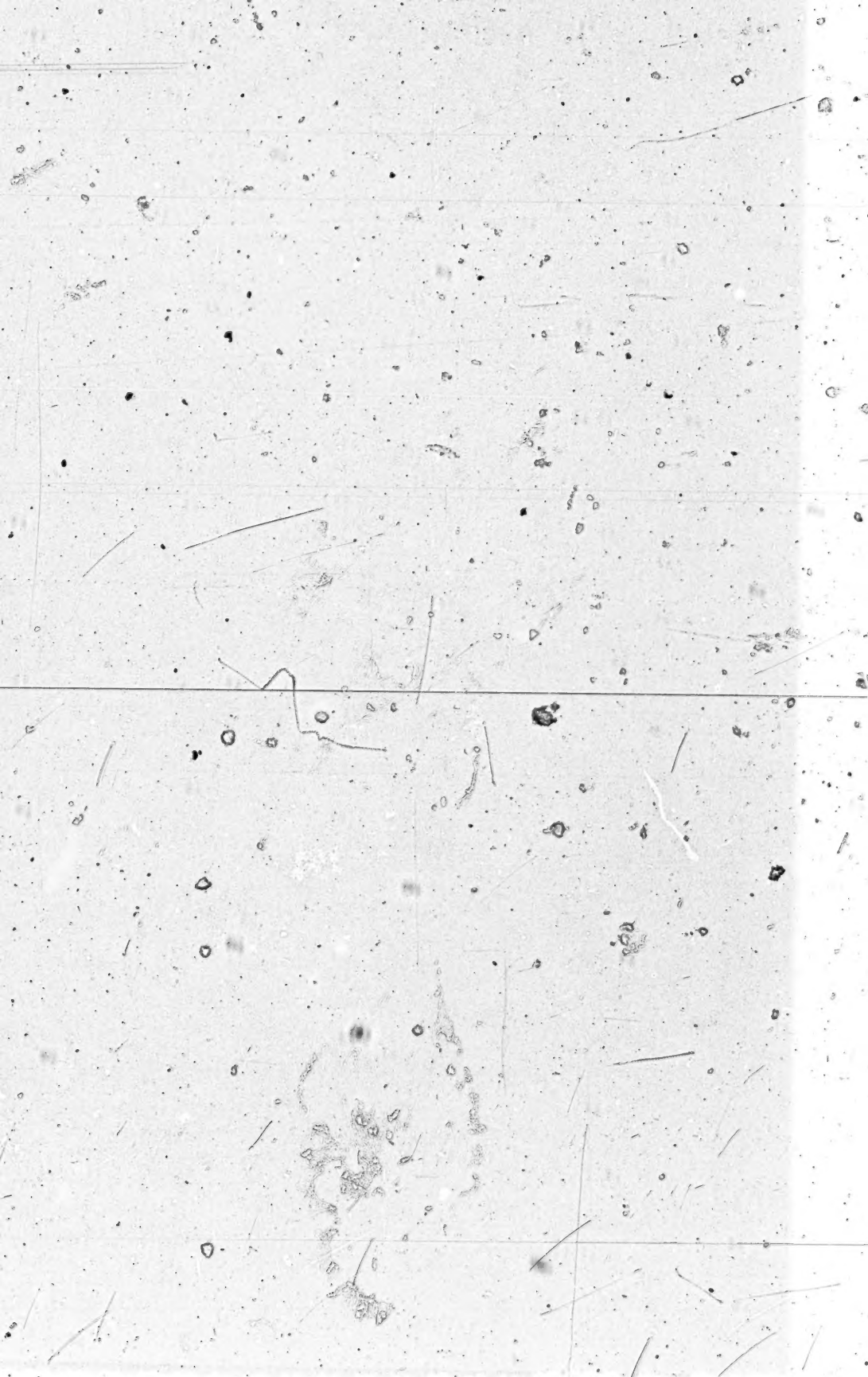
*Cleveland R. Co. v. North Olmsted,* 130 Ohio St. 144, 198 N.E. 41, 101 A.L.R. 426, and

*Bay City Plumbing and Heating Company v. Lind,* 235 Mich. 455 209 N.W. 579.

In this last case the city of Bay City, engaged in installing a new water system, authorized by law, was obliged to lay water pipe through Bangor township to reach property owned by the city on the shore of a bay. This was done without the consent of the township, which consent was required by law. Thereupon the township supervisors and the highway commissioner proceeded with due care to remove the pipe. A suit for damages against these township officials was successful in the trial court. This judgment was reversed by the Supreme Court of Michigan and final judgment rendered for the township officials; the court

holding there was no conflict between the law authorizing a municipality to construct a water system within or without its corporate limits and the law requiring the consent of a political unit to the laying of pipe through its territory, "that the city of Bay City had no right to install its water pipe in the township of Bangor without securing from that township its consent," and that the township officials were therefore within their rights "in removing the trespass."

It is also the position of the respondent that these appellants are necessarily, as a matter of law, by reason of their scheme of doing business in violation either of the County Ordinance or, in the alternative, of the State Public Utilities Law. If they are doing a bona fide taxicab business that business requires that they hold themselves up to the public as being willing to accept passengers for whatever destination and over whatever route may be selected and designated by the passengers; that they operate as a common carrier accepting all applications for passage and without any power to limit their business arbitrarily to one destination rather than another. That this is the nature of the taxicab business is demonstrated in *In re Martinez*, 22 Cal. (2d) 259. That case holds that taxicabs not operating between fixed terminals or over a regular route are subject to municipal regulation and not to regulation under the Public Utilities Law. If, on the other hand, the appellants' passengers on the Mexican side of the border engage passage only to designated cities their operation is that of a bus and may be prosecuted under the State Public Utilities Law, as was done successfully in the case of *People v. Stolzoff*, 71 Cal. App. (2d) Supp. 849. The fact that interstate or foreign commerce may be involved does not preclude prosecution for a violation of a state's carrier law if no federal certificate has been obtained. *McDonald v. Thompson*, 305 U. S. 263;



*Eicholz v. Public Service Commission*, 306 U. S. 268. In general, we believe that this issue is controlled by the following statements in the Stipulated Facts: R. 10, Paragraph II, relates to the taxi-cab business of Buck and Guerra, and the designation of destination by passengers for hire. R. 20-21 shows conclusively that there was a fair hearing as to Guerra before the Board of Supervisors at which hearing his license was revoked; that Buck was charged with violations of valid as well as invalid provisions of the ordinance and failed to appeal to the Board of Supervisors from the action of the Sheriff revoking the license. Neither Buck nor Guerra invoked the right which they undoubtedly have to review the revocation proceedings by mandamus or certiorari in the Superior Court. The right to such review is clearly established by *Greif v. Dullea*, 66 Cal. App. (2d) 986, among other cases. At pp. 1009-1010 the scope of review is outlined.

The judgment as actually signed by Judge Weinberger (R. 24) states in express terms "in all other respects the ordinance is constitutional." It is therefore urged that if appellants contend that the doctrine of res adjudicata or law of the case is applicable, they are now precluded from any effective defense.

As to the points which Judge Weinberger found vulnerable in the ordinance before its amendment, the People and the County did not contend at any time that the Sheriff's attempted regulation was valid. It was only by the amended ordinance enacted after the federal trial that the sheriff was given the authority to promulgate regulations and none of the character referred to in the findings has been promulgated. The former regulation is nowhere involved in the present case. As to the power to revoke or deny licenses, it is first observed that there has been no effort made by defendants under their new applications to secure a hearing before the Board of Supervisors, and of course no appli-

cation to the Superior Court for a review of a denial of a license by the Board of Supervisors.

At the time of the Federal Court trial the ordinance provided:

> "The sheriff may deny the application, or having issued a permit, may revoke the same, if the applicant or taxicab driver is, in the opinion of the sheriff, unfit to drive a taxicab."

The amended ordinance is not merely predicated upon moral character. The present criteria are:

> "The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude."

As previously stated, a hearing before the Board of Supervisors is expressly guaranteed by the ordinance and the case law establishes that the action of the Board of Supervisors may be reviewed by the Superior Court in mandamus or certiorari and the judgment of the Superior Court may be appealed to the State and United States Supreme Courts for final determination.

## APPELLANTS HAVE NOT EXHAUSTED THEIR LOCAL ADMINISTRATIVE AND JUDICIAL REMEDIES.

As previously pointed out the ordinance in Sections 4 (R. 47) and 9 (R. 49-50) insures a hearing before the Board of Supervisors, on demand of the interested party, if the Sheriff determines that the applicant or licensee "is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has

been convicted of any offense involving moral turpitude." The California courts provide a complete judicial review of such determinations. In Greif v. Dullea, 66 Cal. App. 2d 986, a case which involved a cancellation and revocation of a taxicab license, the nature and scope of the judicial review is discussed at pages 1008 through 1010. The holding may be summarized by the statement that quasi-judicial authority has been conferred by the legislature upon local administrative boards, that in a proceeding in certiorari or mandamus to review such a proceeding the Superior Court may not accept evidence in addition to the record of the local board and may not pass upon the truth or falsity of facts, that the appeal to the court is in the nature of appellate review and not a trial de novo. The same case establishes that after review in the Superior Court an appeal from the decision of the Superior Court to the District Court of Appeals is permitted, after which decision the State Supreme Court may in its discretion grant a hearing. At page 1010 of the decision the concluding sentence shows that the District Court of Appeals denied a rehearing and the Supreme Court of the State of California denied a petition for hearing.

Among the many cases requiring one who has an adequate administrative remedy to invoke it or even to exhaust it is Bradley v. Richmond, 227 U. S. 477, a case involving a criminal prosecution in the hustings court of Richmond for violation of a local licensing ordinance. At page 485 the court said:

> "But it is not necessary to rest our judgment upon the question as to whether the plaintiff in error was rightly or erroneously classified, because we are of opinion that he is not in a situation to complain. There was obviously no want of due process of law in the scheme of the ordinance. The occupations to be subjected to the tax were defined. There

was a maximum and minimum limitation as to the amount of the tax, dependent upon the classification. The classification was to be made after notice and a hearing and an appeal from the final action of the committee was permissible. The plaintiff in error might have appeared and shown the character and extent of the business he was doing, and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under the circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council."

In Lehon v. Atlanta, 242 U. S. 53, a nonresident contended that he was exempt from a local ordinance licensing private detectives. The court said at page 55:

"The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the state has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very commonplace to say that the exercise of police is one of the necessary activities of govern-

ment and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide, in effect that all who engage in it or are connected with it as a business shall have the sanction of the state, have the stamp of the state as to fitness and character, take an oath to the state for faithful execution of its duties, and give a bond for their sanction. This the state may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other state.

But the ruling of the local officers in refusing approval of applications of nonresidents of Georgia is urged as a construction of the ordinances or laws of the state, and, it is contended, makes them discriminatory against citizens of other states. Plaintiff in error, however admits he made no effort to comply with the ordinances. The court of appeals, therefore, was of opinion that, whether certain sections of the Penal Code of the state did or did not exclude citizens of other states from engaging as private detectives, plaintiff in error was deprived of no constitutional right, for "as to him the ordinances were not construed at all." In other words, that he had not asserted a right, and, in the absence of assertion, could not have it judicially passed on. We concur in the ruling. It is within the principle of Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633. "To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval."

In Gundling v. Chicago, 177 U. S. 183, the court affirms the power of local government to exercise and delegate discretion in licensing.

A further case bearing upon the requirement of exercise of available remedies is Phyle v. Duffy, 334 U. S. 431, where the court held that the question of the insanity of a prisoner condemned to death should be determined in a state court in a mandamus proceeding which was held to be an adequate local remedy.

## CONCLUSION.

In summary it is urged that the reserve police power of a State permits regulation and supervision of local activities of one engaged in interstate or foreign commerce. The right to require a license involving personal fitness is specifically sustained in:

Hendrick v. Maryland, 235 U. S. 610.

Kane v. New Jersey, 242 U. S. 160.

Smith v. Alabama, 124 U. S. 465.

Other regulatory burdens have been sustained as reasonable when applied to interstate commerce

South Carolina Highway Department v. Barnwell Bros., 303 U. S. 177 (width of vehicles)

Clark v. Poor, 274 U. S. 554 (certificate and tax)

H. P. Welch v. New Hampshire, 306 U. S. 79 (hours of duty of employees)

Aero Mayflower Co. v. Board of Railroad Commissioners, 332 U. S. 495 (annual tax for use of highways).

As previously urged the taxicab is inherently local in its activities and its usefulness, and both Congress and the state legislature have recognized it to be such.

In addition to being local, it is an activity which is unquestionably in need of regulation for the protection of the public and is universally agreed to be such.

United States v. Yellow Cab Co., 69 F. Supp. 170.

McQuillin, Municipal Corporations, 3rd Ed., Vol. 9, p. 421, sec. 26.173

37 Am. Jur. 562, sec. 72

60 C. J. S. 254, sec. 79, 80.

It is submitted that the protection of the public of San Diego County requires the regulation of taxicabs and that such regulation reasonably requires that the sheriff be authorized to inquire into the moral character of licensees and to institute revocation proceedings when he finds it necessary. A fair hearing is guaranteed by the California statutes and decisions. Adequate judicial review is provided. The ordinance as enacted and as applied to appellants is fair and reasonable and does not constitute an unwarranted burden on foreign commerce.

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